WORKING GROUP IN INTELLIGENCE
REQUIREMENTS AND
CRIMINAL CODE REFORM

Memorandum

July 1, 1983

This is to inform you that the Working Group on Intelligence Requirements and Criminal Code Reform had its second meeting on Wednesday, June 29, 1983. All members attended except for Mr. Stern and Mr. Silver, who had other commitments. [redacted] STAT

At the outset, additional suggestions for working topics were solicited. Mr. Martin, Mr. Gettings and Ms. Toensing indicated that in the near future they will have additional suggestions with background material.

A discussion followed concerning the desirability of working on a possible "defense" for intelligence operatives who in good faith may commit acts which might be considered criminal, while in the course of their duties.

Ms. Toensing reported that she has contacted three sources in the Department of Justice who suggested that the problem is not unique to the CIA, the problem is presently resolved through the reasonable exercise of prosecutorial discretion, and that to raise the problem now may create an unfavorable political appearance. Ms. Toensing's own evaluation was that she is comfortable with the reports she received and that everyone would be better off if this particular subject is not considered by the Working Group at this time.

[redacted] noted that a federal statute providing such a defense might create problems vis-a-vis state criminal laws. He indicated that it would be unfortunate to focus possible attention on this problem at this time. [redacted] indicated that the CIA's previous interest in the subject matter was sparked by provisions in the then pending criminal code proposal which would have given extraterritorial effect to a variety of criminal provisions. STAT STAT

Mr. Hirschberg indicated that a number of loosely worded criminal provisions have recently been enacted which have extraterritorial effect and which require that the working group concern itself with the problem. Mr. Hirschberg indicated

that certitude in the law, as a matter of principle, is always preferable than uncertainty. He stated that the Working Group should concern itself with this topic to clear up what is at best a murky and uncertain area of the law. Finally, Mr. Hirschberg indicated that having been a prosecutor himself, he did not believe that the exercise of prosecutorial discretion provided a trustworthy method of resolving problems in this area. He noted that administrations change and with them the attitude of prosecutors.

General Williams commented that at the present time since there were no prosecutions pending there was an ideal opportunity to consider the problem objectively and dispassionately. General Williams rejected the implication of others that the problem should not be discussed as long as prosecutorial discretion provided a workable solution.

Mr. Martin stated that he did not think the problem was urgent enough to require a solution. He said in the past prosecutorial discretion had worked and that he thought the real problem was in the civil area. Mr. Martin indicated that in his opinion no legislation in this area could pass and that he thought it would be a waste of time, therefore, to work on the matter. Mr. Martin attributed significance to the fact that the CIA, as the agency with the greatest concern in this area, was not calling for legislation at this time.

Mr. Gettings agreed that the problem was not unique to the CIA but that a variety of other agencies was also affected. He stated that his experiences in the Felt/Miller case, and in particular with low level agents at the time, convinced him that the problem was of a significant dimension. Mr. Gettings stated that in his view the information given to Ms. Toensing reflected no more than the normal complacency that the Justice Department is likely to reflect unless confronted with the problem. Mr. Gettings noted that positive discussion of the issue has to begin at some point and he felt it to be particularly desirable to commence that discussion at this time. Mr. Gettings suggested that no great significance should be attributed to the attitude of the CIA since it is not the intelligence agency with the greatest concern in the area in light of its jurisdiction. Rather, it is the FBI.

Mr. Kleiboemer stated that in his view the function of our Working Group was to concern itself with legal issues and that neither the attitude of the Department of Justice nor the CIA should be determinative in this area. In Mr. Kleiboemer's view the issue was of significance and he recommended that it be addressed by the Working Group.

In light of the close division of opinion it was decided to postpone a further consideration of the subject until the

next meeting so as to give all members an opportunity to reflect and so as to give Messrs. Silver and Stern an opportunity to make their views known. The Working Group then turned to a consideration of the desirability of reevaluating the adequacy of the present espionage laws, particularly in light of leaks and non-spy situations.

[redacted] presented an outline of an evaluation prepared by Mr. Clarke which calls for a review of the espionage laws. A copy of the outline is attached. In the outline, reference is made to an article by Edgar & Schmidt, which was published in the Columbia Law Review some time ago. [redacted] will send copies of that article to all members.

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With little discussion, it became apparent that the consensus of the Working Group was to undertake a study in this area. However, General Williams, Ms. Toensing, and Mr. Gettings indicated their approval was tentative at this time.

Mr. Martin and Mr. Clarke, in cooperation will prepare a report for the next meeting of the Working Group which will contain the following:

1. A summary of the present espionage and classification statutes;

2. An exposition of the extent to which these statutes are inadequate or impractical;

3. A proposal for legislative reform with draft language.

The next meeting of the Working Group will be scheduled in September after Labor Day.

Axel Kleinboemer

AK/sd
Enclosure

23 June 1983

DRAFT OUTLINE
ISSUES/PROBLEMS CONCERNING THE
ESPIONAGE STATUTES

I. Summary of the Problem

A. In broadest sense the problem is whether current laws are adequate to protect legitimate secrets of the U.S. Government in a variety of circumstances and at an acceptable price. Includes the issue of how legitimate secrets are determined to be such.

B. Problem has certain aspects in classical espionage cases and additional aspects of leak cases (source unknown), other unauthorized disclosures (Agee) (Stockwell?) and cases in which classified material is involved collaterally (ITT).

C. Present the problem as the Working Group sees it and offer range of possible solutions.

II. Classical Espionage Cases

A. Covert passage of classified national security information to agent of a foreign power -- U.S. law certainly proscribes this as criminal offense, although the statutes are not models -- it has been judicial construction that has provided the clarity there is:

1. Gorin v. U.S., 312 U.S. 19 (1941) Prosecution under forerunner of 793(b), 794(a) and (c).

a. construed "information respecting the national defense" broadly

b. required that bad faith or motive be found

c. question of whether information is related to the national defense is for jury

2. U.S. v. Heine, 151 F.2d 813 (2d Cir. 1945), cert. denied, 328 U.S. 833 (1946). Information related to national defense does not include publicly available information -- information not sought to be kept secret.

B. Avoid in-depth analysis of espionage statutes as they relate to classical espionage -- agree with and commend Edgar and Schmidt treatise -- key phrases which constitute elements of the offenses are not adequately and clearly defined, which raises host of questions about coverage; instead of discussing these problems at length, concentrate on practical effects.

C. Recent Espionage Cases Involving CIA

1. In five recent cases the U.S. has obtained convictions under various espionage statutes -- 18 U.S.C. 793, 794 and 798.

a. Moore -- 794(a), 793(e)

b. Boyce -- 793(b), 793(e), 794(c) (conspiracy), 798, 951

c. Lee -- 793(b), (c) & (d), 794(a) & (c), 951

d. Kampiles -- 793(e), 794(a), 641

e. Humphrey-Troung -- 793(e), 794(a) & (c), 951

2. Required Disclosures. While conduct in above cases clearly covered by espionage statutes as judicially construed, the cases presented agonizing problems for CIA because of disclosures required by trial.

a. Public Disclosure -- Problem of publicly disclosing at trial the very information the statutes cover -- this problem is more acute in Moore scenario when espionage is unsuccessful.

(1) Effects -- Disclosure can be limited somewhat if defense counsel does not contest information's defense relatedness and court places the government's evidence under seal -- these are not sure bets.

(2) Some public disclosure will always occur because of need to prove information would cause injury to national defense/advantages to foreign nation --

this usually results in disclosure of additional information due to need to explain to jury defense-relatedness (augmentation).

(3) In cases where espionage was successful, U.S. in effect must confirm the nature of the information to prove its case -- this confirmation process serves to remove any doubt the foreign power may have about the authenticity of information.

(4) These disclosures are inevitable because of requirements of proof under the espionage statutes and the Sixth Amendment guarantee of the right to a public trial and jury trial.

b. Disclosures to Defense Counsel -- these disclosures are required by the discovery process and can involve much additional information beyond that needed by the government to prove its case:

-- Jencks Act statements - 18 U.S.C. 3500

-- Documents etc. material to preparation of defense - Federal Rules of Criminal Procedure 16 (a)(1)(c) including exculpatory material under Brady v. Maryland.

(1) While often painful to provide defense with information clearly falling in these categories (albeit under protective orders) the real problems come with broad ranging defense discovery requests and sometimes made at the last possible moment before trial or even during trial, for information the government views as being not relevant to any material issue in the case.

(2) The Classified Information Procedures Act provides a tool for solving the "graymail" relevancy requests but will not relieve the government of proving essential elements (e.g., defense-relatedness of the classified information at issue).

III. Leaks and Unauthorized Disclosures

A. Statutory Coverage should be covered in more detail because of greater ambiguity than classical espionage -- a basic first question - do any statutes clearly make leaks (unattributable disclosures) and unauthorized disclosures (source acts w/o authority) a crime when made for purpose of furthering public debate on defense matters?

1. Actual Publication -- with the exception of 794(b) publication in time of war with intent that information be communicated to enemy) and 798 (communications intelligence) no other statutes clearly proscribe publication -- aware of no prosecutions - Ellsberg case counts as preparatory conduct.

2. Preparatory Conduct --

a. 793(a)-(c) cover gathering, copying, and obtaining national defense information but require culpable intent (intent or reason to believe injury to U.S. or advantage to foreign nation).

b. Edgar & Schmidt in their treatise conclude that the culpability requirement of these gathering offenses not met when the intention is to engage in public debate or criticize defense policy.

c. 794(a) (communications to foreign government directly or indirectly with intent to injure U.S./give advantage foreign nation) Edgar & Schmidt conclude legislative history shown this section was not intended to include publication.

d. 793(d) & (e) cover willful communications by person in authorized and unauthorized possession of --

(1) documents relating to the national defense, and

(2) information relating to national defense which possessor has reason to believe could be used to injury of U.S./ advantage foreign nation;

to any person not entitled to receive the same; also willful retention after demand in case of authorized possession and mere willful retention if possession unauthorized.

e. Problems with applying 793(d) & (e) to preparatory conduct are --

(1) lack of standard or guidance with respect to element of who is "not entitled to receive" the docs of info

(2) caveat to Internal Security Act of 1950 (of which 793(d) & (e) were part) that nothing in Act should be construed to limit press or speech plus legislative history of 1917 Act that publication or communication motivated by desire to engage in public debate were not prohibited led E&S to conclude that 793(d) & (e) should not apply to communication and retention activities preparatory (they use "incidental") to nonculpable revelations of defense information.

3. 18 U.S.C. 798 - clearly applies to publication, although of narrow category of defense information (communications intelligence activities of U.S., foreign info obtained by such, and cryptographic devices of U.S. or foreign governments).

a. covers communication and transfer as well as publication, so clearly applies to communications and transfer preparatory to publication.

b. use 798 as lead-in to important collateral problem in LEAK/UNAUTHORIZED DISCLOSURE AREA: INVESTIGATIVE PROBLEMS

B. Investigative Problems

1. Unattributable Leaks --

a. Problem of wide dissemination of most information -- practically impossible and certainly expensive in manpower to attempt to find source through usual criminal investigative techniques.

b. One aspect of investigative problem is FBI/DoJ requirement for advance commitment on declassification -- not their approach on classical espionage

(1) intelligence/defense agencies are understandably reluctant to make this commitment prior to knowing where the case will lead

(2) perhaps wrong question to ask -- no reason why classified information cannot be used at trial -- real question is at what stage should you address the issue of information needed to support a prosecution?

c. The Press -- even with a clearly applicable statute the investigative problem eventually runs head on into claimed privileges by the press.

(1) the lack of success in obtaining even an investigation of some leaks that were probably clearly violation of 798 shows this is a very real problem

(2) if no success with leaks under 798 unlikely that some other "strong anti-leak law" will provide a solution

(a) confirmation of the leak may be an obstacle in some cases

(b) augmentation may also be a problem under 798 (or a more general statute for that matter) because of requirement that government must show information properly classified

(c) real problem is no practical/sure way to build a case without taking on the press if you want to find the government employee who is responsible for providing the information

2. Unauthorized Disclosures --

a. source is known -- may be a former employee who gives an interview or writes an article or book

b. may be confirmation or augmentation problems

c. biggest problems are

(1) question of statutory coverage unless 798 applies

(2) tackles First Amendment issues of speech and press head-on

3. Disclosure Problems -- to defense counsel, witnesses, jury and public same as with classical espionage.

IV. Recommendations